

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ROBERT M. WAGGY, )  
Plaintiff, )  
v. )  
UNITED STATES OF AMERICA, )  
Defendant. )  
) No. CV-07-181-CI  
) ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS WITHOUT  
PREJUDICE  
)

Before the court is Defendant's Motion to Remand and Dismiss. (Ct. Rec. 24.) Plaintiff Robert Waggy is appearing pro se; Defendant is represented by Assistant United States Attorney Frank Wilson. On November 1, 2007, the parties consented to proceed before a magistrate judge. (Ct. Rec. 17.)

## BACKGROUND

On May 11, 2007, Plaintiff filed claims in state court against Paul Nicholi, an employee of the United States Department of Veterans Affairs (VA), for negligence, outrage, false reporting and lending criminal assistance. Plaintiff complains that Mr. Nicholi was negligent in providing appropriate treatment for Plaintiff's service-connected disabilities. He also claims that in March 1997, Mr. Nicholi conspired illegally with child protective services (CPS) to have Plaintiff's daughter removed from his care. Plaintiff seeks damages of \$50,000,000. (Ct. Rec. 1.)

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1       A Notice of Removal to federal district court was filed in this  
2 court on June 4, 2007; on June 13, 2007, James A. McDevitt, U.S.  
3 Attorney, certified that Mr. Nicholi was acting "within the course  
4 and scope of his federal employment with respect to the conduct  
5 which forms the basis for Plaintiff's complaint." (Ct. Rec. 2.)  
6 The United States of America was substituted as party by Order of  
7 the court on September 10, 2007, and Mr. Nicholi was dismissed from  
8 the action. (Ct. Rec. 10.)

9       On September 11, 2007, Defendant moved for dismissal of the  
10 Complaint pursuant to FED. R. CIV. P. 12(b)(1), contending that  
11 Plaintiff had failed to exhaust administrative remedies and,  
12 therefore, the court lacked subject-matter jurisdiction. Defendant  
13 also argued Plaintiff failed to state a claim upon which relief can  
14 be granted, FED. R. CIV. P. 12(b)(6). (Ct. Rec. 11, 12.) Plaintiff  
15 responded on September 27, 2007, and objected to dismissal, stating  
16 since the case had been removed to federal court, (1) he is pursuing  
17 federal administrative remedies as required by the Federal Torts  
18 Claim Act, and (2) the statute of limitations did not apply because  
19 the alleged denial of treatment is still occurring. (Ct. Rec. 16.)

20       On January 23, 2008, the court entered an Order (1) staying the  
21 captioned matter for six months to allow Plaintiff to pursue  
22 administrative remedies, (2) striking Defendant's Motion to Dismiss  
23 (Ct. Rec. 11) with leave to refile, and (3) granting Plaintiff leave  
24 to amend his Complaint. (Ct. Rec. 18, 19.) On April 8, 2008,  
25 Plaintiff filed a Motion for a second stay of proceedings, and  
26 requested leave to amend his complaint and request for relief. (Ct.  
27  
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1 Rec. 20.) On May 1, 2008, the court granted Plaintiff's Motion for  
2 additional time and extended the stay to **August 1, 2008**. The court,  
3 however, directed there would be no additional stay or extension for  
4 time unless agreed upon by the parties. (Ct. Rec. 23.) Plaintiff  
5 did not file additional pleadings in support of his Complaint or an  
6 amended complaint within the time frame allowed.

7 On August 14, 2008, Defendant filed the instant Motion to  
8 dismiss and refile its Motion for Reconsideration, requesting  
9 dismissal without prejudice pursuant to FED. R. CIV. P. 12(b)(1), for  
10 failure to exhaust administrative remedies, and for failure to state  
11 a claim upon which relief can be granted pursuant to FED R. CIV. P.  
12 12 (b)(6). (Ct. Rec. 22, 24.)

13 Under the Federal Tort Claims Act, a claimant must exhaust all  
14 available administrative remedies before initiating civil actions  
15 against the United States. 28 U.S.C. § 2675(a). *Rooney v. United*  
16 *States*, 634 F.2d 1238, 1241 (9<sup>th</sup> Cir. 1980). Tort claims against the  
17 United States are barred unless presented to the appropriate federal  
18 agency within two years after that claim accrues. Further, a tort  
19 claim against the United States is "forever barred unless action is  
20 begun within six months after the date of mailing . . . of notice of  
21 final denial of the claim by the agency to which it was presented."  
22 28 U.S.C. § 2401(b); *United States v. Kubrick*, 444 U.S. 111 (1979).

23 Recognizing the difficulty in determining when a medical  
24 malpractice claim accrues for purposes of the FTCA statute of  
25 limitations, the Ninth Circuit has held that where a claim is based  
26 on failure to diagnose, warn or treat a patient for a pre-existing

1 condition, rather than a new injury, a claim accrues under § 2401(b)  
2 when "the patient becomes aware or through the exercise of  
3 reasonable diligence should have become aware of the development of  
4 a pre-existing problem into a more serious condition." *Raddatz v.*  
5 *United States*, 750 F.2d 791, 796 (9<sup>th</sup> Cir. 1984).

6 Here, Plaintiff has not presented evidence of exhaustion of the  
7 administrative remedies as required, despite two stays granted in  
8 these proceedings. Defendant reasonably requests the Motion be  
9 dismissed **without prejudice** to refile if and when relevant  
10 administrative remedies are exhausted. (Ct. Rec. 22 at 3.)  
11 Accordingly.

12 **IT IS ORDERED:**

13 1. Defendant's Motion to Dismiss (Ct. Rec. 24) is **GRANTED**  
14 **without prejudice**.

15 2. Absent a showing of good cause, the time during which this  
16 matter was pending before this court upon removal by Defendant (June  
17 4, 2008, until the entry of this Order) will not be counted in  
18 calculating relevant statutes of limitations (or evaluating  
19 exhaustion issues) that began to run prior to entry of this Order,  
20 should it become necessary to revisit Plaintiff's claims.

21 The District Court Executive shall enter judgment for  
22 **DEFENDANT**, forward copies of this Order to Plaintiff and counsel for  
23 Defendant and close the file.

24 DATED October 8, 2008.

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S/ CYNTHIA IMBROGNO  
27 UNITED STATES MAGISTRATE JUDGE

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